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No. 03-425

Supreme Court, U.S.
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In The

# Supreme Court of the United States

PATSY KEEN,

*Petitioner,*

v.

DIANA WEAVER, INDEPENDENT EXECUTRIX OF THE ESTATES OF FRANCIS J. WEAVER AND RITA MARIE WILSON WEAVER,

*Respondent.*

**On Petition For Writ Of Certiorari To The Supreme Court Of Texas**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Is an employee benefit plan beneficiary's waiver of her interest in benefits in favor of the participant enforceable under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, where the waiver was specific, knowing, and voluntary and was contained in a divorce decree entered into before the effective date of the Retirement Equity Act of 1984?

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## RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that the Court deny the petition for writ of certiorari. In the decision below, the Supreme Court of Texas held that petitioner's knowing and voluntary waiver of her beneficiary interest in her husband's employee benefits was enforceable under ERISA. That holding is supported by the text of ERISA, Supreme Court precedent, and the holdings of the courts of appeals that have addressed the question. Thus, there is no conflict between the decision below and any decision of this Court, and this case does not turn on any issue of law on which there is a conflict among the circuits.

## OPINIONS BELOW

The opinion of the Supreme Court of Texas is reported at __ S.W.3d __, 46 Tex. Sup. Ct. J. 804, and is reprinted at Appendix A to the Petition for a Writ of Certiorari. The opinion of the Court of Appeals of Texas is reported at 43 S.W.3d 537 and is reprinted at Appendix B to the Petition. The district court's findings of facts and conclusions of law and its final judgment are reprinted at Appendix C and D, respectively, to the Petition.

## STATEMENT OF THE CASE

Frank Weaver and the petitioner, Patsy Keen, were married in 1967. During part of their marriage Frank was employed by Baylor College of Medicine. In 1972, as part of his employee benefits at Baylor, Frank applied for both a TIAA contract (the "TIAA Contract") and a CREF certificate (the "CREF Certificate"). In his application Frank

designated Keen, his spouse at the time, as his primary beneficiary and his mother, Rita Marie Weaver, as the contingent beneficiary. The TIAA Contract and CREF Certificate were issued in 1973. It is undisputed that these annuity plans are part of "employee pension benefit plans" as defined in ERISA. *See* 29 U.S.C. § 1002(2)(A).

Keen subsequently filed for divorce from Frank in 1981. During the divorce, Frank was not represented by counsel, but Keen was represented by her current attorney, Maurice Bresenhan. Bresenhan drafted the divorce decree and agreement incident to divorce, which specifically provided that Keen would have no ownership or beneficial rights in Frank's TIAA Contract or CREF Certificate.

Frank and respondent Diana Weaver were married in 1983. They remained married until Frank's unexpected death in 1995. Keen learned of Frank's death through a relative of hers who had read his obituary in the newspaper. Later she contacted TIAA and CREF and applied for benefits under the TIAA Contract and the CREF Certificate. TIAA and CREF thereafter paid part of the proceeds – over $57,000 – to Keen.

Rita Weaver, as the contingent beneficiary, sued Keen and TIAA and CREF, claiming that she was entitled to the annuity proceeds because Keen had waived any claim to the benefits in the divorce decree. Rita died while the suit was pending, so Diana Weaver, as independent executrix of Frank's and Rita's estates, continued the suit. TIAA and CREF interpleaded the remaining benefits.

After a bench trial, the district court held that Keen was entitled to the plan proceeds. The court of appeals reversed. The Supreme Court of Texas affirmed, holding

that Weaver was entitled to the proceeds because in the divorce decree Keen had specifically and voluntarily waived any claim to the plan funds, and her waiver was enforceable under ERISA.

## SUMMARY OF THE ARGUMENT

The only issue in this case is this: where an employee benefit plan participant designates his spouse as beneficiary, and the participant and the beneficiary subsequently divorce and the ex-spouse knowingly and voluntarily waives any claim to the benefits in a divorce decree entered into before the effective date of the Retirement Equity Act of 1984 ("REA"), Pub. L. No. 98-397, 98 Stat. 1426 (1984), is the former spouse nonetheless entitled to the employee benefits? The issue is governed by federal law, including ERISA.

In this case the Supreme Court of Texas followed the decisions of the federal courts of appeals, which have held that under ERISA a beneficiary may effectively waive her claim to benefits so long as the waiver is voluntary and specific. Here, it is undisputed that Keen knowingly and voluntarily waived her rights to the retirement benefits at issue when she signed the couple's decree of divorce and agreement incident to divorce in 1982. Thus, as a result of the valid waiver, Rita Marie Weaver, as Frank's contingent beneficiary, became vested in Frank's retirement benefits upon his death. Those retirement benefits then became a part of the contingent beneficiary's estate upon her death in 1997.

## ARGUMENT

### A. The decision below does not conflict with the text of ERISA, the Court's decision in *Egelhoff v. Egelhoff*, or the decisions of the Sixth Circuit.

A number of federal courts have addressed the issue central to this case. They hold that a designated beneficiary's waiver of her right to employee benefits in favor of the plan participant is not prohibited by, and is therefore enforceable under, ERISA. Moreover, because ERISA does not address the question, the courts have looked to federal common law to determine the standards such a waiver must satisfy in order to be enforceable. They have held that the waiver is enforceable if it is specific, knowing, and voluntary. *See Melton v. Melton*, 324 F.3d 941, 945 (7th Cir. 2003); *Manning v. Hayes*, 212 F.3d 866 (5th Cir. 2000), *cert. denied*, 532 U.S. 941 (2001); *Clift v. Clift*, 210 F.3d 268 (5th Cir. 2000); *Rhoades v. Casey*, 196 F.3d 592 (5th Cir. 1999), *cert. denied*, 531 U.S. 924 (2000); *Hill v. AT&T Corp.*, 125 F.3d 646 (8th Cir. 1997); *Estate of Altobelli v. International Business Machines Corp.*, 77 F.3d 78, 81-82 (4th Cir. 1996); *Mohamed v. Kerr*, 53 F.3d 911 (8th Cir.), *cert. denied*, 516 U.S. 868 (1995); *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321 (5th Cir. 1994), *cert. denied*, 513 U.S. 1081 (1995); *Fox Valley & Vicinity Construction Workers Pension Fund v. Brown*, 897 F.2d 275, 280 (7th Cir.) (en banc), *cert. denied*, 498 U.S. 820 (1990); *Lyman Lumber Co. v. Hill*, 877 F.2d 692 (8th Cir. 1989). That is the rule followed by the Texas Supreme Court in this case.

Although it is not entirely clear, Keen's principal argument in her petition for writ of certiorari appears to be that the rule recognizing waivers of beneficiaries' interests in employee benefit plans contravenes the text of ERISA. Keen says, "ERISA recites that the plan must

specify the basis upon which payments are to be made, states that the plan administrator must administer the plan in accordance with the plan documents and then directs that the plan administrator must pay the plan benefits to the designated beneficiary. ERISA §§ 1002(8), 1002(a)(1)(D)[1] and 1102(b)(4)." *Petition* at 8. Apparently, Keen construes these provisions as mandating that the plan administrator *always* pay *only* the designated beneficiary, regardless of the circumstances.

Keen's construction is clearly wrong for a number of reasons. Foremost, the provisions on which Keen relies – sections 3(8), 402(b)(4), and 404(a)(1)(D) of ERISA – simply do not say what Keen says they do. They merely define "beneficiary," state that an employee benefit plan must "specify the basis on which payments are made to and from the plan," and provide that a fiduciary must discharge his duties in accordance with the plan documents. Those sections are utterly silent as to the effect of waivers or assignments of benefits.

ERISA, however, is not silent on the subject. Section 206(d)(1) of ERISA – the so-called "spendthrift" or "anti-alienation" rule – provides, "Each pension plan should provide that benefits provided under the plan may not be assigned or alienated." 29 U.S.C. § 1056(d)(1). The Court addressed the effect of this rule on ERISA's preemptive scope in *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988). In *Mackey*, the Court considered

[1] This citation is erroneous. Weaver assumes that Keen meant to cite 29 U.S.C. § 1104(a)(1)(D).

the question of whether state laws providing for garnishment of employee welfare benefits are preempted by ERISA. The Court rejected the petitioners' argument that ERISA's preemption provision – section 514(a), 29 U.S.C. § 1144(a) – preempts state garnishment laws as applied to employee welfare benefit plans as well as to employee pension plans. Significantly, the Court's decision turned on the scope of the anti-alienation rule. That rule bars the alienation or assignment of benefits provided for by ERISA pension, but not welfare, plans. 29 U.S.C. § 1056(d)(1). The Court stated, "If we were to give ERISA § 514(a) the meaning which petitioners and the United States attribute to it – barring garnishment of all ERISA plan benefits – we would render § 206(d)(1) substantially redundant with § 514(a), as they concede. . . . As our cases have noted in the past, we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of the same law." 486 U.S. at 837. Thus, the Court found that ERISA does not preempt state garnishment laws as applied to welfare benefits because section 206(d)(1) only applies to pension benefits.[2]

Keen's argument suffers from the same fundamental flaw as the petitioners' argument in *Mackey*. If, as she says, other provisions of ERISA provide that a beneficiary may not waive her interest in benefits, then section 206(d)(1) would be superfluous. Moreover, if the provisions

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[2] As explained in more detail below, the anti-alienation rule does not bar Keen's waiver in this case because it does not apply to the interests of beneficiaries. Moreover, even if it did, the divorce decree would be enforceable because it substantially complied with the requirement for a qualified domestic relations order ("QDRO"), which is an exception to the anti-alienation rule. *See* 29 U.S.C. § 1056(d)(3).

of ERISA upon which Keen relies dictate that a plan administrator may never pay benefits to anyone other than the participant or the designated beneficiary, then the Court's decision in *Mackey* that welfare benefits may be garnished would be incorrect. Thus, *Mackey* is fatal to Keen's central legal theory.

Finally, it is significant that, if Keen's central theory were correct, then ERISA would prohibit the assignment of both welfare and pension plan benefits. Every circuit that has addressed the question, however, has held – in light of the Court's reasoning in *Mackey* – that assignments of employee welfare benefits are enforceable. *See St. Francis Regional Medical Center v. Blue Cross & Blue Shield of Kan., Inc.*, 49 F.3d 1460, 1464 (10th Cir. 1995); *Lutheran Medical Center v. Contractors, Laborers, Teamsters & Engineers Health and Welfare Plan*, 25 F.3d 616, 618-20 (8th Cir. 1994); *Cromwell v. Equicor-Equitable HCA Corp.*, 944 F.2d 1272, 1277 (6th Cir. 1991), *cert. dismissed*, 505 U.S. 1233 (1992); *Memorial Hospital System v. Northbrook Life Ins. Co.*, 904 F.2d 236, 250 (5th Cir. 1990); *Misic v. Building Service Employees Health and Welfare Trust*, 789 F.2d 1374, 1376-77 (9th Cir. 1996).

The decision of the Supreme Court of Texas in this case is not contrary to section 3(8), 402(b)(4), or 404(a)(1)(D) of ERISA.

Keen also repeatedly says that the Texas court's decision in this case conflicts with *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001). The only issue in *Egelhoff*, however, was whether ERISA preempts a Washington statute providing that the designation of a spouse as the beneficiary of an employee benefit plan is revoked automatically upon divorce. In *Egelhoff*, the Court found that the law was

preempted. Thus, as far as *Egelhoff* goes, it simply confirms the propriety of the Texas Supreme Court's conclusion in this case that federal law preempts the Texas state law counterparts to the Washington law found preempted in *Egelhoff*. What *Egelhoff* does not address is the issue in this case: whether, under ERISA, a beneficiary may waive her rights to benefits in favor of the participant. *Egelhoff* simply does not control here.

Indeed, the only decision Keen cites that even superficially supports her position is *McMillan v. Parrott*, 913 F.2d 310 (6th Cir. 1990). In that case, the designated beneficiary, the participant's former wife, and the participant had entered into a joint settlement upon their divorce. In the settlement agreement each party relinquished "any and all claims" against the other. The Sixth Circuit nevertheless held that the beneficiary did not effectively waive her interest in the participant's pension benefits. In doing so, the Sixth Circuit relied on section 404(a)(1)(D) of ERISA, which provides that the plan administrator shall discharge his duties "in accordance with the documents and instruments governing the plan. . . . " 29 U.S.C. § 1104(a)(1)(D). According to the court, that means that "it was [the participant's] designation which controls, not [the beneficiary's] intent." *Id.* at 312. Alternatively, the court found that the beneficiary's waiver was not sufficiently specific to be effective under federal common law. *Id.* The court mentioned ERISA's anti-alienation rule but declined to discuss its applicability, *id.* at 312 n.1, and the opinion does not mention qualified domestic relations orders ("QDROS"), which are an exception to the anti-alienation rule and ERISA's preemption provision. In any event, one of the court's

alternative rationales in *McMillan* provides some support for Keen's position.

More recently, however, the Sixth Circuit decided *Metropolitan Life Insurance Co. v. Marsh*, 119 F.3d 415 (6th Cir. 1997). In that case the participant and the beneficiary entered into a divorce decree in 1978 in which the beneficiary allegedly waived her claim to certain life insurance benefits. Unlike its previous decision in *McMillan*, however, this time the Sixth Circuit considered the potential application of ERISA's anti-alienation rule and the QDRO exception. The court properly found that the anti-alienation rule was not implicated in the case because the life insurance benefits at issue were an employee welfare benefit, whereas the anti-alienation rule applies only to employee pension benefits. The Sixth Circuit also concluded, however, that a QDRO is enforceable with respect to employee welfare benefits as well as to employee pension benefits. The divorce decree in question, though, was entered into before the enactment of the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (1984) ("REA"), which amended ERISA to add the QDRO exception to the anti-alienation rule. The divorce decree at issue in *Marsh* did not comply with all of the statutory requirements for a QDRO. The court concluded, however: "As the divorce decree was written before the REA amended ERISA in 1984, we should not demand literal compliance where Congress' intent has been to give effect to domestic relations orders where it is clear what the decree intended." 119 F.3d at 422. Thus, the court found that the divorce decree effectively waived the beneficiary's interest because it "substantially complied" with ERISA's requirements. *Id.*

*Marsh* indicates that the Sixth Circuit will recognize a beneficiary's waiver where the waiver is contained in a QDRO or, if the waiver occurred before the effective date of the REA, where it is clear what the beneficiary intended. This is consistent with the court's alternative holding in *McMillan* that the waiver in question in that case was not sufficiently specific to be enforceable under federal common law. In this case, the divorce decree between Keen and Frank was entered into in 1982, two years before the enactment of the REA. Moreover, although the divorce decree and agreement incident to divorce may not meet all of the technical requirements for a QDRO – for instance, they do not state Frank's or Keen's "last known mailing address," 29 U.S.C. § 1056(d)(3)(C)(1) – they substantially comply with them. Indeed, they could hardly be more specific. Section 3.02 and schedule 2 of the agreement specifically refer to Frank's "retirement" and "pension" plans, including "The Teachers' Insurance and Annuity Association – College Retirement Equities Fund." As the Texas Supreme Court found, the "waiver was . . . specific and clear." It is hardly surprising, then, that Keen has never even *contended* that she did not intend to surrender her beneficiary interest in the TIAA Contract and the CREF Certificate. Thus, even in the Sixth Circuit's view, Weaver would prevail.

The decision of the Supreme Court of Texas in this case is not in conflict with the text of ERISA, the Court's decision in *Egelhoff*, or the decisions of the Sixth Circuit. In fact, all dictate that Keen effectively waived her interest in the annuity contracts.

**B. The decision below does not violate ERISA's "anti-alienation" rule.**

Keen also argues that the decision of the Texas Supreme Court in this case is in conflict with ERISA's anti-alienation rule. *See* 29 U.S.C. § 1056(d)(1). Keen simply asserts, without explanation, that under the anti-alienation rule Keen, as a beneficiary, could not assign or alienate her "benefits" in Frank's pension plans.

Significantly, Keen ignores the Texas Supreme Court's holding that the anti-alienation rule applies to participants, but not to beneficiaries. The distinction is not a minor one. A participant is "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer. . . . " 29 U.S.C. § 1002(7). A beneficiary, on the other hand, is "a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit thereunder." *Id.* at § 1002(8). Thus, generally the participant is the employee whose service resulted in the accrual of benefits, whereas the beneficiary is simply a person designated by the participant to receive the benefits in the event of his death. *Darden v. Nationwide Mut. Ins. Co.*, 796 F.2d 701, 704 n.3 (4th Cir. 1986). Not surprisingly, then, virtually all of ERISA's provisions governing participation, vesting, and funding of pension benefits focus on the interests of employees, *i.e.*, participants, not on beneficiaries. *See* 29 U.S.C. §§ 1051-1086. The anti-alienation rule is in the midst of these provisions.

Significantly, both federal courts of appeals that have faced the question have held that the anti-alienation rule

simply does not apply to beneficiaries. As the Seventh Circuit explained:

> The spendthrift provisions of ERISA are designed to "ensure that the employee's accrued benefits are actually available for retirement purposes," by preventing unwise assignment or alienation. H.R. Rep. No. 807, 93d Cong., 2d Sess. 1974, *reprinted in* 1974 U.S. Code Cong. & Admin. News 4670, 4734. These provisions focus on the assignment or alienation of benefits by a *participant*, not the waiver of a right to payment of benefits made by a designated beneficiary.

*Fox Valley & Vicinity Constr. Workers Pension Fund*, 897 F.2d at 279-80 (emphasis added); *accord Estate of Altobelli*, 77 F.3d at 81. This conclusion is inescapable given the contingent nature of a beneficiary's interest. Under ERISA a participant ordinarily may change his beneficiary at any time during his lifetime. Thus, the beneficiary's interest in pension benefits is contingent not only on the beneficiary surviving the participant, but also on her remaining his designated beneficiary. She has no "vested" benefits that she can squander, at least while the participant is alive.

The propriety of this analysis is particularly clear where, as here, the beneficiary waives her "right" to the participant's benefits in an agreement with the participant himself. As the Fourth Circuit observed:

> We agree with the Seventh Circuit that the anti-alienation clause does not apply to a beneficiary's waiver. As the Supreme Court has noted, the purpose of the clause is "to safeguard a stream of income for pensioners (and their dependents . . . )." *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 376, 110 S. Ct. 680, 687, 107

> L.Ed.2d 782 (1990). To bar a waiver in favor of the pensioner himself would not advance that purpose.

*Estate of Altobelli*, 77 F.3d at 81. Similarly, barring a waiver in favor of Frank in this case would not serve the purposes of the anti-alienation rule.[3]

The language of the provision of ERISA that sets forth the requirements for a QDRO reinforces the conclusion that the anti-alienation rule does not apply to beneficiaries' unvested interests. In providing for a QDRO, the statute nowhere alludes to the right of "beneficiaries" or "benefits of beneficiaries." On the contrary, it says that the anti-alienation rule "shall apply to the creation, assignment, or recognition of a right to any *benefit payable with respect to a participant* pursuant to a domestic relations order" unless the order qualifies as a QDRO. 29 U.S.C. § 1056(d)(3)(A) (emphasis added). Similarly, one requirement for a QDRO is that it "creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to receive all or a portion of the *benefits payable with respect to a participant* under a plan." *Id.* at § 1056(d)(3)(B)(i). Thus, ERISA creates the

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[3] Indeed, if the anti-alienation provision prohibited a beneficiary's assignment of her unvested right to benefits to a participant, then the provision would also prohibit a participant from changing his beneficiary because that would be an "alienation" of the beneficiary's "right" to benefits. But a participant may change his beneficiary designation at any time. Moreover, Keen's view of the law would result in the anomaly that a beneficiary could not surrender her benefit "rights" in exchange for valuable consideration from the participant when, in fact, the participant is free at any time to deprive the beneficiary of any claim for benefits by simply designating another person as the beneficiary. Keen's position simply cannot be squared with the statute.

QDRO as a way for a participant, but not for a beneficiary, to "assign" or "alienate" pension benefits because the anti-alienation rule covers only participants.

Finally, even if the anti-alienation rule applied to a beneficiary's voluntary assignment of her right to benefits to the participant, this case has been properly decided. Keen simply assumes, without discussion, that her divorce decree does not meet the requirements for a QDRO. As noted above, however, Frank and Keen entered into the decree in 1982, before Congress invented the QDRO when it amended ERISA by enacting the REA. Courts have held that ERISA does not require "literal compliance" with the QDRO requirements for domestic relations orders entered into before January 1, 1985; it suffices if it is clear what the decree intended. *Metropolitan Life Ins. Co. v. Bigelow*, 283 F.3d 436, 443 (2d Cir. 2002); *Metropolitan Life Ins. Co. v. Marsh*, 119 F.3d at 422. Indeed, even courts applying the QDRO requirements to post-REA domestic relations orders have not required literal compliance with those requirements. *Stewart v. Thorpe Holding Co. Profit Sharing Plan*, 207 F.3d 1143, 1151-54 (9th Cir. 2000), *cert. denied*, 531 U.S. 1074 (2001); *Metropolitan Life Ins. Co. v. Wheaton*, 42 F.3d 1080, 1085 (7th Cir. 1994). As noted above, the divorce decree at issue here substantially complied with the requirements for a QDRO. Thus, especially given that Keen has never even *contended* that she did not intend to relinquish any claim to Frank's retirement benefits, there is every reason for a court to enforce the clear provisions of the decree.

## CONCLUSION

The courts of appeals have concluded that a beneficiary's voluntary, explicit waiver of her right to benefits is enforceable under ERISA. Neither the text of ERISA nor *Egelhoff*, a preemption case, dictates a different result. Keen's argument based on ERISA's anti-alienation rule is incorrect for a number of reasons, most fundamentally because the anti-alienation rule does not forbid a beneficiary's waiver of her interest in favor of the participant. In any event, Frank and Keen's divorce decree pre-dates the effective date of the REA, and there is no reason for a court to disregard the decree's plain terms and Frank's and Keen's undisputed intent. The petition for writ of certiorari should be denied.

Respectfully submitted,

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